Supreme Court, U.S.
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No.

In the Supreme Court of the United States

MICHAEL COMFORT, ACTING DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

PHU CHAN HOANG, THANH QUOC NGUYEN, AND PHAM QUA TRUNG

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 1226(c)(1) of Title 8 of the United States Code requires the Attorney General to take into custody aliens who are inadmissible to or deportable from the United States because they have committed a specified offense, including an aggravated felony. Section 1226(c)(2) of Title 8 prohibits release of those aliens during administrative proceedings to remove them from the United States, except in very limited circumstances not present here. The question presented in this case is:

Whether respondents' mandatory detention under Section 1226(c) violates the Due Process Clause of the Fifth Amendment, where each respondent was convicted of an aggravated felony after his admission into the United States.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the District Director of the Denver District of the Immigration and Naturalization Service (INS), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-23a) is reported at 282 F.3d 1247. The orders of the district court (App., *infra*, 24a-25a, 26a-27a, 28a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law.

2. Section 1226(c) of Title 8 of the United States Code provides:

> **Detention of criminal aliens**
>
> **(1) Custody**
>
> The Attorney General shall take into custody any alien who—
>
> **(A)** is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,
>
> **(B)** is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,
>
> **(C)** is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence [*sic*] to a term of imprisonment of at least 1 year, or
>
> **(D)** is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,

> when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.
>
> **(2) Release**
>
> The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

8 U.S.C. 1226(c) (footnote omitted).

STATEMENT

1. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, amended the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, to streamline procedures for removing certain criminal aliens from the United States. As the House Report on IIRIRA explained, Congress concluded that "our immigration laws should enable the prompt admission of those who are entitled to be admitted, the

prompt exclusion or removal of those who are not so entitled, and the clear distinction between these categories." H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. I, at 111 (1996). Congress further determined that "[a]liens who enter or remain in the United States in violation of our law are effectively taking immigration opportunities that might otherwise be extended to others, potential legal immigrants whose presence would be more consistent with the judgment of the elected government of this country about what is in the national interest." S. Rep. No. 249, 104th Cong., 2d Sess. 7 (1996).

The provision of IIRIRA that is at issue in this case is Section 236(c) of the INA, 8 U.S.C. 1226(c). Section 1226(c)(1) requires the Attorney General to take into custody aliens who are inadmissible to or deportable from the United States because they have committed specified crimes. In the case of deportable aliens, Section 1226(c)(1) applies if the alien has been convicted of any of certain specified crimes, including an aggravated felony (as defined in INA Section 101(a)(43), 8 U.S.C. 1101(a)(43)), two or more crimes involving moral turpitude or a crime of moral turpitude that resulted in a sentence of at least one year's imprisonment, a controlled-substance offense (other than simple possession of 30 grams or less of marijuana), a firearms offense, a specified immigration offense, or espionage, sabotage, treason, or threatening the President, see 8 U.S.C. 1226(c)(1)(B) and (C), 1227(a)(2)(A)-(D), or if the alien has engaged in terrorist activities, see 8 U.S.C. 1226(c)(1)(D), 1227(a)(4)(B). Section 1226(c)(2) prohibits release of those aliens during the pendency of administrative proceedings instituted to remove them from the United States, except in very limited circum-

stances involving witness protection. 8 U.S.C. 1226(c)(2).

Detention under Section 1226(c) lasts only for the duration of the criminal alien's administrative removal proceedings.[1] Detention of an alien following entry of a final order of removal is governed by Section 241(a) of the INA, 8 U.S.C. 1231(a). In *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), this Court interpreted Section 1231(a) of Title 8 as limiting the duration of detention following a final removal order, in order to avoid constitutional concerns.

2. Respondents are natives and citizens of Vietnam who are lawful permanent residents of the United States. Each has been charged by the INS with being removable for having committed an aggravated felony as defined in 8 U.S.C. 1101(a)(43).

a. Respondent Hoang entered the United States in 1979. In 1993, at the age of 16, Hoang pleaded guilty to two counts of aggravated robbery involving use of a firearm. He was sentenced to consecutive terms of ten years' imprisonment on each count. In November 2000, after serving more than eight years of his sentence, Hoang was released from state prison. The INS charged him with being removable based on his aggravated robbery convictions and took him into custody under Section 1226(c). Hoang filed a habeas corpus petition under 28 U.S.C. 2241 in the United States District Court for the District of Colorado. Hoang argued that Section 1226(c) violates due process

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[1] In Section 304(a) of IIRIRA, 110 Stat. 3009-587 to 3009-593, Congress instituted a new form of proceeding—known as "removal"—that applies to aliens who have entered the United States but are deportable, as well as to aliens who are excludable at the border. See INA §§ 239, 240, 8 U.S.C. 1229, 1229a.

and is unconstitutional as applied to him. In January 2001, the district court granted the habeas corpus petition and ordered the INS to provide Hoang a bond hearing. After the hearing, Hoang was released on $20,000 bond. See App., *infra*, 6a, 24a-25a.

b. Respondent Nguyen entered the United States in 1991 at the age of 15. In 1999, Nguyen pleaded guilty to the state-law misdemeanor offense of using or threatening to use a dangerous weapon during a fight. He was sentenced to 365 days' imprisonment. In June 2000, the INS charged Nguyen with being removable for having committed an aggravated felony. See 8 U.S.C. 1101(a)(43)(F) (defining "aggravated felony" to include a crime of violence, as defined in 18 U.S.C. 16, for which the term of imprisonment is at least one year). In November 2000, the INS took Nguyen into custody under Section 1226(c). Nguyen filed a habeas corpus petition under 28 U.S.C. 2241 in the United States District Court for the District of Colorado, arguing that Section 1226(c) violates due process. In February 2001, the district court granted a permanent injunction and ordered the INS to provide Nguyen a bond hearing, after which Nguyen was released on $8,000 bond. See App., *infra*, 5a, 26a-27a.

c. Respondent Trung entered the United States in 1987 at the age of 15. In 2000, Trung pleaded guilty to two counts of forgery. He was sentenced to a term of up to five years' imprisonment, with a minimum term of 30 days. In February 2001, the INS charged Trung with being removable as an aggravated felon, see 8 U.S.C. 1101(a)(43)(R), and also for having been convicted of two crimes involving moral turpitude, see 8 U.S.C. 1226(c)(1)(B), 1227(a)(2)(A)(ii). In March 2001, Trung was transferred from state prison to INS custody pursuant to Section 1226(c). Trung filed a habeas

corpus petition under 28 U.S.C. 2241 and an application for a temporary restraining order, asserting that Section 1226(c) violates due process and is unconstitutional as applied to him. In May 2001, the district court granted a temporary restraining order and directed the INS to provide Trung a bond hearing. After the hearing, the INS released Trung on $7,500 bond. See App., *infra*, 6-7a, 28a.

3. The court of appeals consolidated the three cases and affirmed on the ground that Section 1226(c) violates substantive due process as applied to respondents. App., *infra*, 1a-23a. The court of appeals first held, in relevant part, that as lawful permanent residents, respondents have a constitutionally protected liberty interest in being free from detention, which constitutes a fundamental right. *Id.* at 10a-15a. The court of appeals specifically disagreed (*id.* at 11a-12a) with *Parra* v. *Perryman*, 172 F.3d 954 (1999), in which the Seventh Circuit—holding that a lawful permanent resident who conceded that he was removable had forfeited his legal entitlement to remain in the United States—rejected a due process challenge to Section 1226(c).

Relying in part on *Zadvydas* v. *Davis*, *supra*, the court of appeals in this case next held that Congress's plenary power over immigration matters does not insulate Section 1226(c) from due process review and that Section 1226(c), as a non-punitive provision, is constitutional only if supported by "special justifications which outweigh the individual's constitutionally protected interest in avoiding physical restraint." App., *infra*, 19a; see *id.* at 15a-19a. Applying that test, the court of appeals acknowledged that "the government has a compelling interest" in ensuring criminal aliens' attendance at their removal proceedings. *Id.* at 19a. But the court stated that Section 1226(c) is not nar-

rowly tailored to achieve that compelling interest, because "[t]he risk of flight posed by some criminal aliens is insufficient to justify the mandatory detention of all aliens who meet the criteria under [Section 1226(c)]." *Id.* at 21a.

The court of appeals concluded that the government also has a compelling interest in protecting the public from dangerous aliens. App., *infra*, 21a. The court determined, however, that Section 1226(c) requires detention of aliens who do not pose a danger to the public because it can be triggered by an alien's commission of "not only dangerous offenses such as murders, rapes, crimes of terrorist activity, violations of the controlled substances and firearms laws, and crimes committed by repeat offenders, but also less dangerous offenses" such as crimes of moral turpitude, theft, or fraud. *Ibid.*

The court of appeals therefore held that the government had failed to establish "special justifications" for mandatory detention of criminal aliens under Section 1226(c) that outweigh the liberty interest of lawful permanent resident aliens such as respondents. App., *infra*, 22a. After determining that Section 1226(c) cannot be construed to avoid the constitutional difficulty that the court perceived, *id.* at 22a-23a, the court held that Section 1226(c) violates substantive due process as applied to respondents as lawful permanent resident aliens, *id.* at 23a.

REASONS FOR GRANTING THE PETITION

The question in this case is whether the mandatory detention provisions of 8 U.S.C. 1226(c) satisfy the requirements of due process as applied to criminal aliens who are lawful permanent residents of the United States. A petition presenting the same question

is pending before the Court in *DeMore* v. *Kim*, No. 01-1491 (petition filed Apr. 9, 2002), a case that arises from the Ninth Circuit. The question of whether Section 1226(c) satisfies due process requirements as applied to an alien who entered the United States unlawfully, without inspection, is pending before the Court in *Elwood* v. *Radoncic*, No. 01-1459 (petition filed Apr. 4, 2002), which arises from the Third Circuit. The Solicitor General has suggested that the petitions in both *Kim* and *Elwood* should be granted and the cases should be set for oral argument in tandem with each other, or consolidated for argument. See *Kim* Pet. 19.

As the petitions in *Radoncic* (at 19-22) and *Kim* (at 19) explain, the government has sought review in both of those cases for two reasons. *First*, granting certiorari in a case that involves a lawful permanent resident as well as in a case that involves an alien unlawfully present in the United States—who is entitled to lesser due process protection in this context[2]—will enable the Court to address the constitutionality of Section 1226(c) in a wider range of applications and therefore reduce the likelihood of future disagreements in the lower courts about the constitutionality of applying Section 1226(c) to particular classes of aliens. *Second*, granting review in two cases, rather than just one, is appropriate in light of the unusual potential for mootness in habeas corpus

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[2] See *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982) ("[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly."); *Johnson* v. *Eisentrager*, 339 U.S. 763, 770 (1950) ("The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society.").

challenges to Section 1226(c). See *Radoncic* Pet. 20-21.[3] Because the Ninth Circuit's decision in *Kim* presents a live case that also involves a lawful permanent resident, however, we do not recommend hearing oral argument in this case, as well as in *Kim*.[4] The petition in this case therefore should be held pending the Court's disposition of *Kim* and *Radoncic* and disposed of in accordance with the Court's decisions in those cases.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's disposition of the petitions in *DeMore* v. *Kim*, petition for cert. pending, No. 01-1491 (filed Apr. 9, 2002), and *Elwood* v. *Radoncic*, petition for cert. pending, No. 01-1459 (filed Apr. 4, 2002), and then should be disposed of as appropriate in light of the final dispositions of those cases.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

MAY 2002

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[3] This case is not moot. Respondents' administrative removal proceedings are pending before immigration judges and none of the respondents is subject to a final order of removal at this time.

[4] Should the Court determine—when considering the petition in *Kim* or after that petition has been granted—that *Kim* is an unsuitable vehicle for considering the constitutionality of Section 1226(c) in the context of a lawful permanent resident alien, this case could provide an appropriate alternative vehicle for resolving that question.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 01-1136, 01-1180, 01-1343

PHU CHAN HOANG, THANH QUOC NGUYEN, AND PHAM QUA TRUNG, PETITIONERS-APPELLEES

v.

MICHAEL COMFORT, ACTING DISTRICT DIRECTOR, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, DENVER, COLORADO, RESPONDENT APPELLANT

CITIZENS AND IMMIGRANTS FOR EQUAL JUSTICE; AMERICAN IMMIGRATION LAWYERS ASSOCIATION, AMICI CURIAE

March 5, 2002

Before: BRISCOE and BALDOCK, Circuit Judges, and ALLEY, District Judge. [5]

BRISCOE, Circuit Judge.

The United States Immigration and Naturalization Service (INS) appeals the district court's rulings in three cases which held that Section 236(c) of the Immigration and Nationality Act, 8 U.S.C. § 1226(c),

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[5] The Honorable Wayne E. Alley, United States District Court for the Western District of Oklahoma, sitting by designation.

(INA) is unconstitutional as violative of both substantive and procedural due process. Section 236(c) of the INA requires the mandatory detention of criminal aliens pending administrative removal proceedings. We agree that the mandatory detention provision found in § 236(c) of the INA, as applied to petitioners, violates their substantive due process rights and affirm the district court.

I.

Under the INA as first enacted in 1952, an alien convicted either of a crime involving moral turpitude if the crime was committed within five years of entry into the United States or a crime violating drug or firearm laws was subject to deportation. INA § 241, codified at 8 U.S.C. § 1251 (1952). However, the INA provided the Attorney General with discretion to release such aliens on bond pending final determination of deportability. INA § 223, codified at 8 U.S.C. § 156 (1952).

In 1988, Congress amended the INA as part of the Anti Drug Abuse Act of 1988 (ADAA). The ADAA established a new category of deportable alien, the aggravated felon, which included any alien who committed crimes involving murder, drug trafficking, illicit trafficking in firearms and destructive devices, and any attempt or conspiracy to commit such crimes. ADAA § 7342, amending 8 U.S.C. § 1251(a). Under the ADAA, detention of such aliens pending removal proceedings was mandatory. ADAA § 7343(a).

However, a majority of federal district courts addressing the issue found the mandatory detention provision of the ADAA unconstitutional. See *Martinez v. Greene*, 28 F.Supp.2d 1275, 1279 (D. Colo. 1998), and cases cited therein. As a result, Congress amended the

mandatory detention statute in 1990 and 1991 to permit the release of aggravated felons who were lawfully admitted to the United States and who could demonstrate they were not a threat to the community and were likely to appear for their hearings. *Id.*

In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, Stat. 1214 (AEDPA). The AEDPA created automatic mandatory detention without bond for aggravated felons and other non-citizens with criminal convictions. INA § 242(a)(2), codified at 8 U.S.C. § 1252. See *Martinez*, 28 F.Supp.2d at 1280. However, the AEDPA's amendment was almost immediately replaced with the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 1570, which amended the INA to include § 236(c), the provision at issue here.

Section 236(c), codified at 8 U.S.C. § 1226(c), is a mandatory pre-removal detention provision directed at criminal aliens. It directs, in pertinent part, that:

The Attorney General shall take into custody an alien who—

> (A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,
>
> (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,
>
> (C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been [sentenced] to a term of imprisonment of at least 1 year, or

> (D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,
>
> when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

8 U.S.C. § 1226(c)(1). Thus, under § 236(c), the Attorney General is directed to detain "deportable" criminal aliens following release from their original sentences prior to decisions on their removal from the United States. The Attorney General has discretion to release an alien only if the alien or an immediate family member is participating in the federal Witness Protection Program and the alien "satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding." 8 U.S.C. § 1226(c)(2).

Section 236(c) did not immediately become applicable with the passage of the IIRIRA. Instead, the IIRIRA contained "transition period custody rules" which provided immigration bond hearings to aliens with criminal convictions wherein the aliens were allowed to demonstrate legal entry and that they did not present a substantial risk of flight or threat to persons or property. The immigration court had discretion to set bond pending final administrative action. See IIRIRA § 303(b)(3); *Martinez*, 28 F.Supp.2d at 1280. The transition rules expired on October 9, 1998, and § 236(c) became effective.

II.

The three petitioners in these cases, Thanh Quoc Nguyen, Phu Chang Hoang and Pham Qua Trung, were all detained pursuant to § 236(c).

Thanh Quoc Nguyen

Nguyen entered the United States as a refugee from Vietnam in 1991 at the age of fifteen. He was admitted as a lawful permanent resident.

In February 1999, Nguyen pled guilty to the misdemeanor offense of threat/use of a dangerous weapon in a fight. He was sentenced to 365 days in jail, with 320 days suspended. Due to probation violations, he ultimately served his entire sentence. Upon completion of his sentence, he was detained by the INS, which had earlier commenced removal proceedings.

On February 12, 2001, after approximately three months in custody, Nguyen petitioned for a writ of habeas corpus arguing that § 236(c), as applied, was unconstitutional. He also filed an application for a temporary restraining order asking for an individual bond hearing. On February 13, 2001, the district court granted a permanent injunction and ordered the INS to provide a bond hearing. After a hearing, Nguyen was released on $8,000 bond.

Nguyen is currently seeking a withholding of removal under the INA, as well as relief under the Convention Against Torture, 8 C.F.R. § 208.18 (2001). He is also seeking post-trial relief in state court. Specifically, he seeks reduction of his sentence by one day, which would make him eligible to apply for cancellation of removal. See 8 U.S.C. § 1226(c)(1)(C).

Phu Chang Hoang

Hoang entered the United States as a refugee from Vietnam in 1979 at the age of three. He was admitted as a lawful permanent resident.

In February 1993, at the age of sixteen, Hoang pled guilty to two counts of aggravated robbery in connection with the stealing of a purse and wallet by use of force, threats, and intimidation with the aid of a firearm. He was sentenced to ten years on each count, to be served consecutively. Hoang served eight and a half years and was released, whereupon he was detained by the INS and removal proceedings were begun.

On January 24, 2001, some two months after being detained, Hoang petitioned for a writ of habeas corpus arguing that § 236(c), as applied, was unconstitutional. He also filed an application for a temporary restraining order requesting an individual bond hearing. The district court granted a final injunction in favor of Hoang directing the INS to conduct a bond hearing. After the hearing, Hoang was released on $20,000 bond. Hoang is currently seeking relief for removal under the Convention Against Torture.

Pham Qua Trung

Trung entered the United States as a refugee from Vietnam in 1987 at the age of fifteen. He was admitted as a lawful permanent resident.

On August 9, 2000, Trung pled guilty to two counts of forgery in Utah state court. He was sentenced to an indeterminate term not to exceed five years, and was required to serve thirty days. Upon completion of his sentence, he was detained by the INS, which had begun removal proceedings a month earlier.

On April 27, 2001, after more than a month in detention, Trung petitioned for a writ of habeas corpus arguing that § 236(c), as applied, was unconstitutional. Trung also filed an application for temporary restraining order, requesting an individual bond hearing. The district court granted the order and directed the INS to conduct a bond hearing. After a hearing, Trung was released on $7,500 bond.

Trung is currently seeking withholding of removal under the Convention Against Torture, and is also challenging the INS's contention that his forgery conviction constitutes an aggravated felony under the INA. 8 U.S.C. § 1227(a)(2)(A). If the challenge is successful, Trung would be eligible to apply for cancellation of removal. In addition, he is seeking a reduction of his sentence in state court which would render him eligible for cancellation or removal.

III.

In all three appeals, we are asked to review the district court's ruling that § 236(c) is unconstitutional. Although § 236(e) of the INA, 8 U.S.C. § 1226(e), provides that "[t]he Attorney General's discretionary judgment regarding the application of [§ 236] shall not be subject to review," courts retain jurisdiction over habeas petitions which include constitutional challenges. *Parra* v. *Perryman*, 172 F.3d 954, 957 (7th Cir. 1999). See *Ho* v. *Greene*, 204 F.3d 1045, 1051-52 (10th Cir. 2000), *overruled on other grounds by Zadvydas* v. *Davis*, 533 U.S. 678, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001).

Statutes are presumed to be constitutional. See *United States* v. *Pompey*, 264 F.3d 1176, 1179 (10th Cir.

2001). This court reviews challenges to the constitutionality of a statute under a de novo standard. *Id.*

The constitutionality of § 236(c) in the face of a due process challenge has been addressed by numerous courts, with conflicting results. The Seventh Circuit has held that § 236(c) does not violate either substantive or procedural due process. See *Parra*, 172 F.3d at 958. The Third Circuit and the Ninth Circuit have held that § 236(c) does violate substantive due process. See *Patel* v. *Zemski*, 275 F.3d 299 (3rd Cir. 2001); *Kim* v. *Ziglar*, 276 F.3d 523 (9th Cir. 2002).

IV.

As a preliminary issue, the government argues that the district court's decisions in Hoang's and Nguyen's cases should be reversed and the habeas petitions in those cases dismissed for failure to exhaust administrative remedies. The government contends that comprehensive administrative procedures are available under Title 8 of the Code of Federal Regulations for aliens to dispute that § 236(c) applies to them and to seek bond. See 8 C.F.R. §§ 3.19 and 236.1. Therefore, according to the government, Hoang and Nguyen should follow those procedures before being allowed to file habeas actions.

With regard to immigration laws, exhaustion of remedies is statutorily required only for appeals of final orders of removal. See 8 U.S.C. § 1252(d)(1). The government does not contend that exhaustion is statutorily mandated, but instead argues that exhaustion should be required to protect administrative authority and promote judicial efficiency, citing *McCarthy* v. *Madigan*, 503 U.S. 140, 145, 112 S.Ct. 1081, 117 L.Ed.2d 291 (1992).

We disagree. While *McCarthy* provides that courts may, in their discretion, require exhaustion of administrative remedies, there are "at least three broad sets of circumstances in which the interests of the individual weigh heavily against requiring administrative exhaustion": 1) where requiring resort to an administrative remedy may cause undue prejudice to the assertion of a subsequent court action, as where the time period required for administrative action is unreasonable or indefinite; 2) where the administrative remedy is inadequate because of doubt as to whether the agency is empowered to grant relief; and 3) where the administrative remedy is inadequate because the administrative body is biased or has otherwise predetermined the issue before it. 503 U.S. at 146-149, 112 S.Ct. 1081. All three of these categories apply here.

First, a petitioner's detention during the period required for the exhaustion of remedies may infringe upon his or her rights, especially where the issue sought to be raised, the constitutionality of § 236(c), is one which does not implicate the discretion or the expertise of the agency involved. See *Welch* v. *Reno*, 101 F.Supp.2d 347, 351-52 (D. Md. 2000). Second, the agency involved, the Board of Immigration Appeals (BIA), does not have the power to reach constitutional arguments, and thus is not empowered to grant effective relief. See *Yanez* v. *Holder*, 149 F.Supp.2d 485, 489-90 (N.D. Ill. 2001); *Welch*, 101 F.Supp.2d at 351-52. Third, the BIA has previously ruled that it is barred by § 236(c) from granting bond, and therefore any attempt by a petitioner to exhaust would be futile. See *Galvez* v. *Lewis*, 56 F.Supp.2d 637, 644 (E.D. Va. 1999).

As a result, we decline to reverse the district court's decisions in Hoang's and Nguyen's cases for failure to

exhaust administrative remedies, and instead proceed to the question of whether § 236(c) violates the petitioners' due process rights.

V.

> The Due Process Clause of the Fifth Amendment provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." This Court has held that the Due Process Clause protects individuals against two types of government action. So-called "substantive due process" prevents the government from engaging in conduct that "shocks the conscience," or interferes with rights "implicit in the concept of ordered liberty." When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. This requirement has traditionally been referred to as "procedural" due process.

United States v. *Salerno*, 481 U.S. 739, 746, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987) (internal citations omitted).

The petitioners' challenge is to the constitutionality of § 236(c) as applied to them, rather than a facial challenge. Therefore, in order to prevail, they need only show that the statute, as applied to their particular situations, violates due process.

Nature of Petitioners' Interest

The first step in any due process analysis is a careful identification of the asserted right. See *Reno* v. *Flores*, 507 U.S. 292, 302, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993). If the liberty interest asserted by the petitioners may

be characterized as fundamental, then a governmental provision infringing upon that interest must be narrowly tailored to serve a compelling governmental interest. *See id.*

The government argues that the petitioners' alleged interests are not fundamental because, as aliens who are subject to § 236(c), the petitioners have forfeited any rights to remain in the country and thus any liberty interests they may have had are greatly diminished. The government contends that the petitioners' interests should therefore be characterized, in accordance with the holding in *Parra*, as "not liberty in the abstract, but liberty in the United States by someone no longer entitled to remain in this country but eligible to live at liberty in his native land." See 172 F.3d at 958. The Seventh Circuit found that this interest was not fundamental because

> [p]ersons subject to [§ 236(c)] have forfeited any *legal* entitlement to remain in the United States and have little hope of clemency. . . . Before the IIRIRA bail was available to persons in Parra's position as a corollary to the possibility of discretionary relief from deportation; now that this possibility is so remote, so too is any reason for release pending removal. Parra's legal right to remain in the United States has come to an end. An alien in Parra's position can withdraw his defense of the removal proceeding and return to his native land, thus ending his detention immediately. He has the keys in his pocket. A criminal alien who insists on postponing the inevitable has no constitutional right to remain at large during the ensuing delay, and the United States has a powerful interest in

> maintaining the detention in order to ensure that removal actually occurs.

Id.

We do not agree with the Seventh Circuit's determination that an alien who is subject to § 236(c) has somehow forfeited his or her right to liberty during deportation proceedings. A similar argument was recently rejected in *Zadvydas* v. *Davis*, 533 U.S. 678, 121 S.Ct. 2491, 2501, 150 L.Ed.2d 653 (2001). In *Zadvydas*, the Court held that even an alien who had already been ordered to be deported retained a liberty interest strong enough to raise a due process challenge concerning his or her indefinite and possibly permanent detention resulting from the inability to carry out the deportation order. In so holding, the Court expressly rejected the government's position that "whatever liberty interest the aliens possess, it is 'greatly diminished' by their lack of a legal right to 'liv[e] at large in this country.'" *Id.* at 2502. In the wake of the Court's ruling in *Zadvydas*, the vitality of the Seventh Circuit's holding in *Parra* is greatly diminished, as is the government's argument which relies upon *Parra*.

The petitioners in this case are presently lawful permanent residents of the United States. Although they are "deportable" because of their criminal records, they remain lawful permanent residents until such time as they are finally ordered deported. See 8 C.F.R. § 1.1(p) (stating that lawful permanent resident status terminates upon entry of a final administrative order of exclusion or deportation). Aliens who are lawful permanent residents of and are physically present in the United States are persons within the protection of the Fifth Amendment, and may not be deprived of life, liberty or property without due process of law. See

Kwong Hai Chew v. *Colding*, 344 U.S. 590, 596, 73 S.Ct. 472, 97 L.Ed. 576 (1953).

The petitioners are not asserting that the Government has no right to detain them incident to their deportation proceedings. Indeed, such an argument would be futile, as the government's power to detain pursuant to deportation proceedings is well established. See *Wong Wing* v. *United States*, 163 U.S. 228, 235, 16 S.Ct. 977, 41 L.Ed. 140 (1896) (stating that detention necessary to carry out deportation would be valid). Rather, the petitioners are asserting they have a fundamental liberty interest that may not be arbitrarily infringed upon by the Government absent an opportunity for an individualized hearing to address risk of flight and danger to the public. That is the liberty interest at issue in this case.

The question then becomes whether the petitioners' liberty interest is a fundamental right, thus triggering heightened scrutiny. The government contends that the right of an alien to be free from detention is not a fundamental right, citing *Flores*. In *Flores*, the Supreme Court addressed the constitutionality of a regulation which permitted the release of detained juvenile aliens, arrested on suspicion of being deportable, only to their parents, legal guardians, adult relatives, or other appointed and approved caregivers. 507 U.S. at 297, 113 S.Ct. 1439. If no one in this category was available, the regulation required the juvenile's placement in a foster care facility.

In categorizing the right of the juveniles to other placement, the Court refused to find the right to be fundamental, stating that:

> The "freedom from physical restraint" invoked by respondents is not at issue in this case. Surely not in the sense of shackles, chains, or barred cells, given the Juvenile Care Agreement [authorizing placement only in certain juvenile care facilities]. Nor even in the sense of a right to come and go at will, since, as we have said elsewhere, "juveniles, unlike adults, are always in some form of custody," and where the custody of the parent or legal guardian fails, the government may (indeed, we have said *must*) either exercise custody itself or appoint someone else to do so. Nor is the right asserted the right of a child to be released from all other custody into the custody of its parents, legal guardian, or even close relatives: The challenged regulation requires such release when it is sought. Rather, the right at issue is the alleged right of a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, to be placed in the custody of a willing-and-able private custodian rather than of a government-operated or government-selected child-care institution.

Id. at 302, 113 S.Ct. 1439 (internal citations omitted). Applying only rational basis scrutiny, the Court found the regulation did not violate due process. *Id.* at 303-06, 113 S.Ct. 1439.

Flores, however, is distinguishable from the instant case. The petitioners here are adults, and thus have the right to come and go at will. Further, although the juveniles in *Flores* were not facing physical restraint in the sense of shackles, chains, or barred cells, that is exactly the form of restraint the petitioners face here.

"Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause." *Foucha* v. *Louisiana*, 504 U.S. 71, 80, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992). "In our society liberty is the norm, and detention prior to trial or without trial is a carefully limited exception." *Salerno*, 481 U.S. at 755, 107 S.Ct. 2095. Even in the context of aliens, government detention violates the Due Process Clause unless the detention is ordered in a criminal proceeding with adequate procedural protections, or in "certain special and narrow nonpunitive circumstances . . . where a special justification . . . outweighs the individual's constitutionally protected interest in avoiding physical restraint." *Zadvydas*, 121 S.Ct. at 2499 (internal citations omitted). In *Salerno*, the Court recognized that a person who is detained pending trial has a fundamental liberty interest in freedom from restraint. See 481 U.S. at 750-51, 107 S.Ct. 2095. The liberty interest of a person who is detained pending deportation proceedings is no less fundamental. See *Rodriguez-Fernandez* v. *Wilkinson*, 654 F.2d 1382, 1387 (10th Cir. 1981) (analogizing detention pending trial with detention pending deportation proceedings). As a result, we conclude that the petitioners have a fundamental liberty interest in freedom from detention pending deportation proceedings that may only be infringed upon in certain limited circumstances.

Congressional Authority in Immigration

The government argues that § 236(c) is constitutional given the power of Congress in the area of immigration. The government contends that Congress' broad power to legislate in the area of immigration limits judicial review of Congress' decisions with regard to detention pending deportation and removal hearings.

Congress has plenary authority over substantive immigration decisions under Art. I, § 8, cl. 4 of the Constitution. See *INS* v. *Chadha*, 462 U.S. 919, 941, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). "'[O]ver no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." *Fiallo* v. *Bell*, 430 U.S. 787, 792, 97 S.Ct. 1473, 52 L.Ed.2d 50 (1977) (quoting *Oceanic Navigation Co.* v. *Stranahan*, 214 U.S. 320, 339, 29 S.Ct. 671, 53 L.Ed. 1013 (1909)). This power is of a political character which is subject only to narrow judicial review. See *Fiallo*, 430 U.S. at 792, 97 S.Ct. 1473. However, statutes which implement this plenary authority are subject to the limits of the Constitution. See *Zadvydas*, 121 S.Ct. at 2501; *Chadha*, 462 U.S. at 940-41, 103 S.Ct. 2764. Thus, while aliens are subject to the plenary power of Congress to expel them, Congress' implementation of this authority must comport with the Constitution. See *Carlson* v. *Landon*, 342 U.S. 524, 534-37, 72 S.Ct. 525, 96 L.Ed. 547 (1952).

In *Chadha*, the Court rejected the argument that the plenary power of Congress required courts to uphold the constitutionality of INA § 244(c)(2), which gave either house of Congress a veto over decisions by the Attorney General to suspend deportation proceedings. In concluding that this statute was subject to due process review, the Court stated: "The plenary authority of Congress over aliens under Art I, § 8, cl. 4, is not open to question, but what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing that power." 462 U.S. at 940-41, 103 S.Ct. 2764. Similarly, in *Zadvydas*, the Court rejected the Government's argument that Congress' plenary power over immigration gave it the

power to indefinitely detain aliens who had been found to be removable but could not be removed because their home countries would not take them. The Court noted:

> The question before us is not one of "confer[ring] on those admitted the right to remain against the national will" or "sufferance of aliens" who should be removed. Rather, the issue we address is whether aliens that the Government finds itself unable to remove are to be condemned to an indefinite term or [*sic*] imprisonment within the United States.

121 S.Ct. at 2501 (internal citations omitted).

Like the statutes at issue in *Chadha* and *Zadvydas*, § 236(c) concerns the method by which the immigration statutes are implemented and not the political substantive decision of who is to be admitted or excluded. As such, § 236(c) must comply with the Constitution. See *Chadha*, 462 U.S. at 940-41, 103 S.Ct. 2764.

Substantive Due Process

Where the right implicated in a substantive due process analysis is fundamental, the Government may not infringe upon it, regardless of the process provided, unless the infringement is narrowly tailored to serve a compelling state interest. See *Flores*, 507 U.S. at 302, 113 S.Ct. 1439. Governmental detention in a non-criminal proceeding offends the Due Process Clause except in certain non-punitive circumstances where a special justification outweighs the individual's constitutionally protected interest in avoiding physical restraint. See *Zadvydas*, 121 S.Ct. at 2499.

Thus, in order to pass constitutional muster, § 236(c) must first be non-punitive. See *id.*; *Salerno*, 481 U.S. at 746-47, 107 S.Ct. 1549. In determining whether a re-

striction on liberty constitutes punishment, we initially look to whether Congress intended the statute to be punitive, or whether another purpose may rationally be assigned to the restriction on liberty. See *Salerno*, 481 U.S. at 747, 107 S.Ct. 2095; *Bell* v. *Wolfish*, 441 U.S. 520, 537, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). If Congress intended the restriction on liberty to be punishment, or if there is no other purpose that may rationally be assigned to it, it is punitive. However, even if a restriction was not meant to be punishment and a non-punitive purpose may be rationally assigned to it, the restriction may still constitute punishment if it imposes conditions so excessive in relation to the assigned purpose as to be considered punitive rather than regulatory. See *Salerno*, 481 U.S. at 747, 107 S.Ct. 2095; *Bell*, 441 U.S. at 537, 99 S.Ct. 1861.

Our analysis of the statute leads us to conclude that § 236(c) is non-punitive. Nothing in the legislative history of § 236(c) suggests that mandatory detention was intended by Congress as a punishment for aliens. Rather, a review of the legislative history indicates that the mandatory detention provision was designed to serve two legitimate nonpunitive purposes: ensuring removal by preventing the alien from fleeing, and protecting the community from further criminal acts or other dangers. See S. Rep. No. 104-48, 104th Cong., 1st Sess. (1995) at 23-27, 31-32; 63 Fed. Reg. 27441, 27442 (May 19, 1998). The detention imposed by § 236(c) is rationally related to these two purposes. Further, the detention imposed is not so excessive in relation to the two purposes of the statute as to constitute punishment.

We turn to the second part of the analysis—whether the purposes espoused for the mandatory detention

provision, flight prevention and crime prevention, constitute special justifications which outweigh the individual's constitutionally protected interest in avoiding physical restraint. See *Zadvydas*, 121 S.Ct. at 2499. Our analysis of this issue entails a determination of whether the government's interest is compelling and whether the statute is narrowly tailored such that the government's interest outweighs that of the individual. See *Salerno*, 481 U.S. at 749-51, 107 S.Ct. 2095.

The government contends that the mandatory detention provision contained in § 236(c) is necessary to protect against the risk of flight by deportable aliens. According to the government, Congress determined that the detention was necessary to ensure that deportable aliens appeared for their deportation proceedings. The government reasons that because those persons subject to § 236(c) are likely to be deported, they may be presumed to be flight risks.

Certainly, the government has a compelling interest in ensuring attendance by deportable aliens at deportation proceedings. However, § 236(c) is not narrowly tailored to achieve that interest. Rather than establishing a procedure to determine which aliens might be flight risks, it establishes an irrebuttable presumption that all aliens to which mandatory detention applies are flight risks.

The government argues that certain presumptions with regard to immigration are valid, citing *Carlson*, 342 U.S. 524, 72 S.Ct. 525, 96 L.Ed. 547. In *Carlson*, the Court addressed a provision which allowed the Attorney General to detain without bail, pending deportation, those aliens who were members of the Communist Party. The Court found the provision to be constitutional, reasoning that "[d]etention is necessarily

a part of this deportation procedure" because otherwise "aliens arrested for deportation would have opportunities to hurt the United States during the pendency of deportation proceedings." *Id.* at 538, 72 S.Ct. 525.

Carlson, however, does not support the government's argument. The detention provision in *Carlson* was not categorically applied, but instead was based on an individual determination of dangerousness made by the Attorney General, and the decision to detain without bail was subject to judicial review. The Court in *Carlson* expressly rejected the idea that intent to injure could be imputed to all aliens who were subject to deportation as members of the Communist Party. *Id.* at 542, 72 S.Ct. 525. Unlike the detention provision at issue in *Carlson*, § 236(c) does not provide for an individual determination of risk of flight, choosing instead to impute flight risk to all criminal aliens.

The Senate Report which spawned the creation of § 236(c) found that over 20% of non-detained aliens did not appear for their deportation proceedings. S. Rep. No. 104-48 at 23-24. Presumably, however, this means that somewhere near 80% of non-detained aliens in that time period did in fact appear. It is true that the more likely a person is to be removed, the less likely it is that the person will appear for removal proceedings. Nevertheless, a risk of flight cannot be imputed to all who fit the broad category of persons affected by § 236(c). The fallacy in such a blanket assumption is especially pertinent as applied to the petitioners here. All three petitioners are currently pursuing avenues which, if successful, would lessen the probability that they will be deported or removed. Thus, they have a significant incentive to attend deportation proceedings.

The risk of flight posed by some criminal aliens is insufficient to justify the mandatory detention of all aliens who meet the criteria under § 236(c). Although the government has a compelling interest in ensuring that deportable aliens appear for their proceedings, this interest is not sufficient to justify detention of a lawful permanent resident alien absent an individualized determination that the alien is in fact a flight risk.

The second asserted reason for mandatory detention, the safety of the public, provides even less justification for such detention. While it cannot be denied that the government has a compelling interest in protecting the public from dangerous aliens, § 236(c) applies the blanket irrebuttable presumption that all those to whom it applies are dangerous, a presumption not justified by the nature of offenses which § 236(c) encompasses. Offenses to which the mandatory detention provision in § 236(c) applies include not only dangerous offenses such as murders, rapes, crimes of terrorist activity, violations of the controlled substances and firearms laws, and crimes committed by repeat offenders, but also less dangerous offenses such as crimes of moral turpitude with a sentence of one year in prison, theft offenses with a term of imprisonment of one year or more, fraud, tax evasion, assisting document fraud in some cases, and perjury. See 8 U.S.C. § 1226(c); 8 U.S.C. § 1101(a)(43).

Absent an individualized determination of dangerousness, it cannot simply be assumed that persons who have at one time been convicted of the crimes encompassed by § 236(c) pose a danger to the public. However, this is exactly what § 236(c) does. Given the wide range of offenses covered by § 236(c), the safety of the public does not justify its mandatory detention of lawful

permanent resident aliens without individualized determinations that they in fact pose a danger to the public.

Any argument that § 236(c)'s blanket presumption of flight risk and dangerousness is narrowly tailored is further undermined by the results of the bond hearing granted to the petitioners by the district court. After an examination of their individual circumstances, all three petitioners were ordered released on various amounts of bond, thus refuting the proposition that they were such flight risks or so dangerous that mandatory detention was required.

We therefore conclude that the government has failed to show special justifications for the mandatory detention provision contained in § 236(c) which are sufficient to outweigh a lawful permanent resident alien's constitutionally protected liberty interest in avoiding physical restraint without an individualized determination of flight risk or danger to the public. Therefore, we hold that § 236(c) violates the petitioners' rights to substantive due process. Our holding in this regard makes it unnecessary for us to reach the petitioners' claim that § 236(c) also deprives them of procedural due process.

VI.

There is a question as to whether we should adopt a construction of § 236(c) which would be constitutional. Where one construction of a statute would raise serious constitutional problems but an alternative interpretation is fairly possible and would avoid such problems, the alternative interpretation should be adopted. See *INS* v. *St. Cyr*, 533 U.S. 289, 121 S.Ct. 2271, 2279, 150 L.Ed.2d 347 (2001). The petitioners contend that such an alternative interpretation is possible if we were to

construe the term "is deportable" in § 236(c) to mean "subject to a final order of removal." Under this interpretation, § 236(c) would only impose mandatory detention on those aliens who had received a final order of removal.

However, it is clear from the text of the statute that Congress intended the "is deportable" language of § 236(c) to apply prior to a final order of removal. Given this clear intention of Congress, we may not adopt a saving construction that is plainly contrary to this intent. *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 78, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994).

VII.

We hold that the mandatory detention provision of § 236(c), as applied to the petitioners as lawful permanent resident aliens, violates their right to substantive due process.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 01-B-139

PHU CHAN HOANG, PETITIONER

v.

JOSEPH R. GREENE, DISTRICT DIRECTOR,
IMMIGRATION & NATURALIZATION SERVICE, DENVER,
COLORADO, RESPONDENT

[Filed: Jan. 29, 2001]

ORDER

LEWIS T. BABCOCK, Chief Judge.

Pending before the Court is Petitioner Phu Chan Hoang's motion for temporary restraining order. At the January 30, 2001 hearing, the government moved to consolidate the hearing with trial on the merits for a final injunction pursuant to Fed. R. Civ. P. 65(a)(2). After consideration of the motion, the facts and circumstances concerning Petitioner, counsels' argument, and for the reasons stated on the record during the hearing, which are incorporated into this Order, consistent with

SCFC ILC, Inc. v. Visa USA, Inc., 936 F.2d 1096, 1098 (10th Cir. 1991), IT IS ORDERED that:

1. this case SHALL BE TRANSFERRED to my case-load and REDESIGNATED as Case No. 01-B-139;
2. the government's oral motion to convert this hearing to a final injunction hearing is GRANTED;
3. Petitioners's motion for final injunction is GRANTED;
4. the Defendant SHALL CONDUCT a forthwith bond hearing in accordance with *Martinez v. Greene*, 28 F.Supp.2d 1275 (D.Colo. 1998); and
5. the Clerk of the Court SHALL ENTER final judgment consistent with the Orders contained herein.

Dated: January 30, 2001, at Denver, Colorado.

BY THE COURT:

/s/

LEWIS T. BABCOCK, CHIEF JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 01-K-256
Judge John L. Kane

THAHN QUOC NGUYEN, PLAINTIFF

v.

JOSEPH R. GREENE, DISTRICT DIRECTOR, UNITED STATES IMMIGRATION & NATURALIZATION SERVICE, DENVER, COLORADO, DEFENDANT

ORDER

KANE, J.

Consistent with the findings and conclusions of the February 13, 2001 hearing, it is

ORDERED

1. That the hearing on temporary restraining order is converted to a final injunction hearing.
2. Petitioner's motion for final injunction is **GRANTED**.
3. The Defendant shall conduct a **FORTHWITH BOND HEARING** in accordance with *Martinez v. Greene*, 28 F. Supp.2d 1275 (D. Colo. 1998).
4. The Order to Show Cause is **VACATED**.

5. The Clerk of the Court shall enter **FINAL JUDGMENT** consistent with the Orders contained herein.

Dated at Denver, Colorado, this 13th day of February, 2001.

BY THE COURT:

/s/

JOHN L. KANE, SENIOR JUDGE
UNITED STATES DISTRICT COURT

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 01-D-787
Judge John L. Kane

PHAM QUA TRUNG, PETITIONERS

v.

MICHAEL COMFORT, ACTING DISTRICT DIRECTOR, UNITED STATES IMMIGRATION & NATURALIZATION SERVICE, DENVER, COLORADO, DEFENDANT

Filed: May 1, 2001

TEMPORARY RESTRAINING ORDER

KANE, J.

In consideration of the Application for Temporary Restraining Order, filed May 1, 2001, it is

ORDERED that the application is **GRANTED**. The Defendant shall conduct a bond hearing in accordance with *Martinez v. Greene*, 28 F. Supp.2d 1275 (D. Colo. 1998).

Dated at Denver, Colorado, this 1st day of May, 2001.

BY THE COURT:

/s/

JOHN L. KANE, SENIOR JUDGE
UNITED STATES DISTRICT COURT

(2)

No. 01-1616

Supreme Court, U.S.
FILED
JUN 5 2002
OFFICE OF THE CLERK

In The
Supreme Court of the United States

MICHAEL COMFORT, ACTING DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

v.

PHU CHAN HOANG, THANH QUOC NGUYEN, and PHAM QUA TRUNG,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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H.R. 1452, 107th Cong. (2001) 4, 14

Immigration and Naturalization Oversight: Hearings on INS Reform: Detention Issues Before the Senate Subcomm. on Immigration, Comm. on the Judiciary, 1998 WL 767401 (F.D.C.H.), 105th Cong. (1998) (testimony of Doris Meissner, former Comm'r, INS) 4

STATEMENT

This case presents a narrow issue: whether the government can mandatorily detain a broad group of criminal aliens, many convicted of relatively minor crimes, without any individualized determination that their detention is warranted because they pose a danger or flight risk. At issue in this case is not the government's authority to remove aliens who have been convicted of certain crimes, nor its authority to use detention to effectuate removal, *i.e.*, to detain individuals who might otherwise flee or present a danger to the community. Rather, the only question is whether Congress has chosen a constitutionally permissible means to effectuate these goals, mandatory detention under 8 U.S.C. 1226(c).

As this Court recently reiterated in *Zadvydas v. Davis*, although Congress has "'plenary power' to create immigration law . . . that power is subject to important constitutional limitations." 533 U.S. 678, 695 (2001) (citations omitted). Consistent with *Zadvydas*, the court of appeals correctly held that Section 1226(c)'s requirement of detention without any individualized determination of danger or flight risk violates due process. The court of appeals' ruling does not prevent the government from detaining any alien who presents a danger or flight risk, or from placing the burden on aliens to demonstrate lack of danger and flight risk. It merely requires some individualized determination rather than a blanket and categorical presumption that cannot be refuted. Indeed, current regulations – which are in no way affected by the court of appeals' ruling – *require* that the Attorney General detain any alien who cannot demonstrate lack of danger and flight risk.

A. 8 U.S.C. 1226(c).

The statute at issue in this case, 8 U.S.C. 1226(c), governs the detention of criminal aliens pending proceedings to determine if they are deportable from the United States. The statute requires the Immigration and Naturalization Service (INS) to take into custody any alien who "is deportable" from the United States based on having been convicted of any of a wide range of crimes. *See* 8 U.S.C. 1226(c)(1)(B) & (C). It then prohibits the INS from releasing any such individual (except under very narrow circumstances involving witness protection), *see* 8 U.S.C. 1226(c)(2), even individuals like the three respondents here, who are longtime lawful permanent residents of the United States, who are eligible for various forms of relief from removal, and who were subsequently determined to pose no danger or flight risk that requires their detention.

Both before and after Section 1226(c)'s enactment, the government expressed discomfort with the statute's broad mandatory detention requirement.[1] Largely because of these concerns, the INS persuaded Congress to defer

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[1] Letter from Andrew Fois, former Assistant Attorney General, to Robert Dole, then-Senate Majority Leader (April 16, 1996) (Ex. Q of Petitioner-Appellee's Brief before the court of appeals) (strongly opposing mandatory detention provision and noting that existing law, which authorized discretionary release of lawfully admitted aliens who could show lack of danger and flight risk, "permit[ted] the appropriate allocation of resources to [the] objective of removing criminals and other deportable aliens"); Letter from Jon P. Jennings, former Acting Assistant Attorney General, to the Honorable Albert Gore, Jr., then-President of the Senate (June 10, 1999) (Ex. G of Petitioner-Appellee's Brief before the court of appeals) (noting that "in some respects, the [statute] went too far" and urging Congress to restore the Attorney General's discretion to release certain aliens).

implementation of Section 1226(c) for two years, and to replace it with "Transition Period Custody Rules" (TPCR). *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 303(b), Pub. L. No. 104-208, 110 Stat. 3009-586.[2] These rules, which were in effect from October 1996 until October 1998, permitted the Attorney General to release lawfully admitted criminal aliens who

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[2] IIRIRA 303(b)(3) provides:

(A) In general. – During the period in which this paragraph is in effect pursuant to paragraph (2), the Attorney General shall take into custody any alien who –

(i) has been convicted of an aggravated felony (as defined under section 101(a)(43) of the Immigration and Nationality Act, as amended by section 321 of this division),

(ii) is inadmissible by reason of having committed any offense covered in section 212(a)(2) of such Act,

(iii) is deportable by reason of having committed any offense covered in section 241(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of such Act (before redesignation under this subtitle), or

(iv) is inadmissible under section 212(a)(3)(B) of such Act or deportable under section 241(a)(4)(B) of such Act (before redesignation under this subtitle), when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(B) Release. – The Attorney General may release the alien only if the alien is an alien described in subparagraph (A)(ii) or (A)(iii) and –

(i) the alien was lawfully admitted to the United States and satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding, or

(ii) the alien was not lawfully admitted to the United States, cannot be removed because the designated country of removal will not accept the alien, and satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding.

could demonstrate that they were neither a danger nor flight risk. IIRIRA 303(b)(3)(B)(i).

The INS sought an extension of the TPCR based on their success in increasing criminal alien removal as well as INS' continuing concern that Section 1226(c)'s broad detention mandate would undermine INS enforcement efforts.[3] This effort was unsuccessful and Section 1226(c) took effect in October 1998. Legislation is currently pending in the House Judiciary Committee that would restore the Attorney General's discretion to release from detention certain lawful permanent residents who can demonstrate that they pose neither a danger nor flight risk. *See* H.R. 1452, 107th Cong. (2001). This legislation would apply to all three of the respondents, thereby mooting this case.[4]

Numerous regulations govern the detention and release of aliens, wholly apart from Section 1226(c), and continue to apply to the respondents. In all cases where an alien is eligible for release consideration, the INS

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[3] *See* Immigration and Naturalization Oversight: Hearings on INS Reform: Detention Issues Before the Senate Subcomm. on Immigration, Comm. on the Judiciary, 1998 WL 767401 (F.D.C.H.), 105th Cong. (1998) (testimony of Doris Meissner, former Comm'r, INS).

[4] Section 2(a) of the proposed legislation, titled "Cancellation of Removal for Certain Permanent Residents," authorizes discretionary release of longtime lawful permanent residents who have not been convicted of aggravated felonies for which they were sentenced to five years, or in the case of indeterminate sentences, for which they served five years. H.R. 1452, 107th Cong. (2001). Section 2(b) of the legislation, titled in part, "Cancellation of Removal for Certain other Permanent Residents," authorizes discretionary release of longtime lawful permanent residents who, although convicted of a disqualifying aggravated felony, would nonetheless be eligible under the provision to apply for cancellation of removal based on "urgent humanitarian reasons or significant public benefit." *Id.*

makes an initial determination whether an alien poses a danger or flight risk and whether to allow release on bond. 8 C.F.R. 236.1(c)(8). That determination may be reviewed by an immigration judge at a hearing at which the INS may demonstrate why the alien should not be released on bond. 8 C.F.R. 3.19(a), (d). If the immigration judge grants release, the INS can appeal the decision to the Board of Immigration Appeals (BIA) and seek an emergency stay of the release order pending appeal. 8 C.F.R. 3.19(f), 3.19(i)(1), 3.38. Significantly, the INS may, in any case, invoke an "automatic stay" of an immigration judge release order, thereby preventing the alien's release pending the BIA's ruling on the INS' bond appeal. 8 C.F.R. 3.19(i)(2).[5] These provisions remain in place and their applicability is not affected by the court of appeals' decision.

B. Factual Background.

The three respondents are longtime lawful permanent residents who were admitted to the United States as refugees from Vietnam. Pet. App. 5a-7a. All three face removal proceedings as a result of criminal convictions for which they served their sentences. *Id.*[6] Following completion

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[5] These regulations were recently strengthened to allow the automatic stay to continue after a release order is upheld by the BIA, so that the INS can seek certification of the order to the Attorney General. *See* 66 Fed. Reg. 54,909, 54,910 (2001) (codified at 8 C.F.R. pt. 3).

[6] Mr. Trung pled guilty to two charges of forgery, for which he was required to serve only 30 days. Pet. App. 6a. Mr. Nguyen pled guilty to the misdemeanor offense of threat/use of a dangerous weapon in a fight, for which he was sentenced to 365 days. Pet. App. 5a. At the age of 16, Mr. Hoang pled guilty to two counts of aggravated robbery, for which he received a ten-year sentence on each count, to be served consecutively. He was released after serving eight and a half years, based on good behavior. Pet. App. 6a.

of those sentences, the respondents were mandatorily detained by the INS for several months under Section 1226(c) until the district court, in three separate habeas actions, declared the statute unconstitutional and ordered that they be provided with individualized bond hearings. *Id.*

The government did not seek a stay of the district court orders. It also did not appeal administratively the subsequent determination by an immigration judge in each case that the respondents posed no danger or flight risk that required their detention. The respondents were thus permitted to post bond and are currently released. *Id.*[7] All three have been complying with their conditions of release and reporting for their hearings. None of the three has been ordered deported by an immigration judge, and all are eligible for – and seeking – various forms of relief from removal. *Id.*[8]

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[7] Mr. Trung was ordered released on a $7,500 bond, Mr. Nguyen on an $8,000 bond, and Mr. Hoang on a $20,000 bond. Pet. App. 5a-7a.

[8] All three respondents are eligible for relief under the Convention Against Torture; two of the three are also eligible for withholding of removal under 8 U.S.C. 1231(b)(3). Pet. App. 5a, 7a. In addition, two of the respondents are seeking post-conviction relief which, if granted, would mean that their convictions are not "aggravated felonies," thereby making them eligible for both cancellation of removal and asylum. *Id.* One of these, Mr. Trung, asserts that, even without post-conviction relief, his conviction does not constitute an "aggravated felony," since he received only a 30-day sentence. Pet. App. 7a. Were he to prevail on this claim, he would be eligible to apply for both a discretionary waiver of deportation and asylum. *Id.* The third, Mr. Hoang, also has a claim for a discretionary waiver of deportation under former 8 U.S.C. 1182(c) (1994) (repealed 1996), based on the fact that he pled guilty to his crime prior to 1996, *see INS v. St. Cyr*, 533 U.S. 289, 326 (2001) (holding that discretionary waivers under former Section 1182(c) remain available to aliens who pled guilty to their offenses prior to April 24, 1996). Mr. Hoang asserts that had the INS timely

(Continued on following page)

C. The Court of Appeals' Decision.

After consolidating all three cases, the court of appeals, in a unanimous opinion, affirmed the district court holdings that Section 1226(c) violates due process as applied to the respondents. Pet. App. 23a. The court of appeals first summarized the legislative background of Section 1226(c), noting that an earlier mandatory detention statute, enacted in 1988, had been declared unconstitutional by the majority of district courts that considered it, and was thereafter amended by Congress to permit the release of lawfully admitted aliens who could demonstrate lack of danger and flight risk. Pet. App. 2a-3a. The court also noted that Section 1226(c)'s mandatory detention requirement did not take effect until two years after IIRIRA's enactment, since Congress specifically provided for "transition period custody rules" (TPCR), which permitted the release on bond of criminal aliens who could demonstrate lawful entry and lack of danger or flight risk. Pet. App. 4a (citing IIRIRA 303(b)(3)).

The court of appeals then turned to its constitutional analysis of Section 1226(c). In light of this Court's decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001), the court of appeals rejected the government's argument that aliens subject to Section 1226(c) have no fundamental liberty interest that is implicated by their detention. Pet. App. 11a-12a. The court found the government's reliance on *Parra v. Perryman*, 172 F.3d 954 (7th Cir. 1999), misplaced, explaining that the Seventh Circuit's conclusion in *Parra* that aliens subject to Section 1226(c) have forfeited

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commenced removal proceedings, he would have been eligible for Section 1182(c) relief at that time, because he had not actually served five years.

any legal right to remain in the country, and thus that their liberty interests "are greatly diminished," was inconsistent with this Court's analysis in *Zadvydas*, where "[a] similar argument was recently rejected[:]"

> In *Zadvydas*, . . . the Court expressly rejected the government's position that "whatever liberty interest the aliens possess, it is 'greatly diminished' by their lack of a legal right to 'liv[e] at large in this country.'" . . . In the wake of the Court's ruling in *Zadvydas*, the vitality of the Seventh Circuit's holding in *Parra* is greatly diminished, as is the government's argument which relies upon *Parra*.

Pet. App. 12a.

The court of appeals emphasized that respondents "are not asserting that the Government has no right to detain them incident to their deportation proceedings," but rather that "they have a fundamental liberty interest that may not be arbitrarily infringed upon by the Government absent an opportunity for an individualized hearing to address risk of flight and danger to the public." Pet. App. 13a. In characterizing the liberty interest as "fundamental," the court distinguished it from the non-fundamental liberty interest in *Reno v. Flores*, 507 U.S. 292 (1993). Pet. App. 13a-14a. Quoting from this Court's opinion in *Flores*, the court of appeals noted that "'freedom from physical restraint . . . [was] not at issue'" in *Flores*, "'[s]urely not in the sense of shackles, chains, or barred cells,'" since at issue for the alien juveniles in that case was merely placement in licensed juvenile care facilities. Pet. App. 14a (citing *Flores*, 507 U.S. at 302). Moreover, "'juveniles, unlike adults, are always in some form of custody.'" *Id.* In contrast, the respondents here are adults who are "facing

physical restraint in the sense of shackles, chains, or barred cells." *Id.*

The court further emphasized the "fundamental" nature of the liberty interest by citing to this Court's decisions in *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992), *United States v. Salerno*, 481 U.S. 739, 750-51, 755 (1987), and *Zadvydas*, 121 S. Ct. at 2499. Pet. App. 15a. As a result, the court concluded that respondents have "a fundamental liberty interest in freedom from detention pending immigration proceedings that may only be infringed upon in certain limited circumstances." Pet. App. 15a.

The court of appeals next addressed the government's argument that Congress' plenary power over immigration limited the court's review over Congress' decisions with regard to immigration detention. Pet. App. 16a. Again relying on *Zadvydas* – where this Court addressed and rejected a similar argument – the court of appeals concluded that because Section 1226(c) "concerns the method by which the immigration statutes are implemented and not the political substantive decision of who is to be admitted or excluded . . . [it] must comply with the Constitution." Pet. App. 17a (citing *Zadvydas,* 121 S. Ct. at 2501, and *INS v. Chadha*, 462 U.S. 919, 941 (1983)). *See also* Pet. App. 16a ("[W]hile aliens are subject to the plenary power of Congress to expel them, Congress' implementation of this authority must comport with the Constitution.") (citing *Carlson v. Landon*, 342 U.S. 524, 534-37 (1952)).

The court of appeals then applied the due process test this Court re-articulated in *Zadvydas*. In doing so, the court gave weight to the government's "compelling interest in ensuring attendance by deportable aliens at deportation

proceedings" (Pet. App. 19a) as well as its "compelling interest in protecting the public from dangerous aliens." Pet. App. 21a. However, the court of appeals found that neither of these provided sufficient justification "to outweigh a lawful permanent resident alien's constitutionally protected liberty interest in avoiding physical restraint without an individualized determination of flight risk or danger to the public." Pet. App. 22a.

With respect to flight risk, the court of appeals rejected the government's argument that because "persons subject to [Section 1226(c)] are likely to be deported, they may be presumed to be flight risks." Pet. App. 19a. The court noted that the Senate Report cited by the government found a 20% failure to appear rate for aliens not detained during deportation proceedings, which "means that somewhere near 80% of non-detained aliens . . . did in fact appear." Pet. App. 20a. The court thus concluded that "[t]he risk of flight posed by some criminal aliens is insufficient to justify the mandatory detention of all aliens who meet the criteria under Section [1226(c)]." Pet. App. 21a.[9] In addition, the court noted that "[t]he fallacy in such a blanket assumption [of flight risk] is especially pertinent as applied to the [respondents]" since they "are currently pursuing avenues which, if successful, would lessen the probability that they will be deported or removed," and thus "have a significant incentive to attend deportation hearings." Pet. App. 20a.

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[9] The court further observed that, contrary to this Court's "express[ ] reject[ion] [of] the idea that intent to injure could be imputed to all aliens who were subject to deportation as members of the Communist Party" in *Carlson v. Landon*, 342 U.S. 524, 542 (1952), Section 1226(c) "impute[s] flight risk to all criminal aliens." Pet. App. 20a.

The court of appeals similarly rejected the government's contention that Section 1226(c) was necessary to protect the safety of the public, finding this argument even less persuasive. The court concluded that Section 1226(c)'s "blanket irrebuttable presumption that all those to whom it applies are dangerous" is "not justified by the nature of offenses which [it] encompasses" – which include fraud, tax evasion and perjury. Pet. App. 21a. The court drew further support for its holding from the results of respondents' individualized bond hearings, which refuted the government's contention "that they were such flight risks or so dangerous that mandatory detention was required." Pet. App. 22a.

Finally, the court considered, but rejected, respondents' argument that Section 1226(c) should be construed as not applying to the respondents, thereby allowing the court to avoid reaching the constitutional issue. The court characterized respondents' argument as requiring the court to construe Section 1226(c) as applying only to individuals "subject to a final order of removal," a construction which the court found was "plainly contrary" to Congress' intent. Pet. App. 23a.

REASONS FOR DENYING THE WRIT

The government is not seeking plenary review of the court of appeals' decision, but is asking that this petition be held pending disposition of the government's petitions in *Demore v. Kim* (No. 01-1491), and *Elwood v. Radoncic* (No. 01-1459), which also concern the constitutionality of Section 1226(c). This petition should be denied for the same reasons that both those petitions should be denied.

See Respondent's Brief in Opposition ("*Kim* Opp.") at 10-27, *Demore v. Kim* (No. 01-1491) (setting forth reasons for denying certiorari in *Kim)*; *id.* at 27-28 (summarizing additional reasons for denying certiorari in *Radoncic*).

1. First, there is no conflict among the courts of appeals that this Court needs to resolve. All of the courts of appeals to consider the constitutionality of Section 1226(c) since this Court decided *Zadvydas v. Davis*, 533 U.S. 678 (2001), agree that in light of the analysis in *Zadvydas,* Section 1226(c) violates due process. The Third, Ninth and Tenth Circuits each considered Section 1226(c) post-*Zadvydas* and reached this conclusion in unanimous decisions. *See Patel v. Zemski*, 275 F.3d 299 (3d Cir. 2001); *Kim v. Ziglar*, 276 F.3d 523 (9th Cir. 2002); and the case below, Pet. App. 1a-23a. The only court of appeals to uphold Section 1226(c), the Seventh Circuit in *Parra v. Perryman*, 172 F.3d 954 (7th Cir. 1999), did so pre-*Zadvydas*, applying an analysis that cannot be reconciled with this Court's reasoning. *See Kim* Opp. at 12-14. Moreover, the circumstances in that case are in any event distinguishable because the alien conceded deportability and was not eligible for any relief from deportation. *See id.*

2. Second, the decision below – and the decisions of the two other circuits that considered Section 1226(c) post-*Zadvydas* – reflect a straightforward application of the legal standard enunciated in *Zadvydas,* as well as in this Court's prior detention cases such as *United States v. Salerno*, 481 U.S. 739 (1987), *Foucha v. Louisiana*, 504 U.S. 71 (1992), *Kansas v. Hendricks*, 521 U.S. 346 (1997), *Carlson v. Landon*, 342 U.S. 524 (1952), and *Reno v. Flores*, 507 U.S. 292 (1993). Indeed, the constitutional failure of Section 1226(c) is more fundamental than the

question that troubled this Court in *Zadvydas* since the statute provides *no* procedure whereby an individual can demonstrate suitability for release. For this reason, Section 1226(c) cannot survive even the more deferential due process test set forth in Justice Kennedy's dissenting opinion in *Zadvydas* (joined by Chief Justice Rehnquist), which focused on the importance of such procedural protections to ensure that detention is not "arbitrary." *See Zadvydas*, 533 U.S. at 721 (Kennedy, J., dissenting). Notably, this Court has never upheld a detention scheme that prohibits any individualized determination of whether the purposes of detention are being served. *See Kim* Opp. at 15-21.[10]

3. Third, the court of appeals' decision in no way impedes the government's ability to detain and remove criminal aliens. Detention continues to be required of any alien who poses a danger or flight risk. *See* 8 C.F.R. 236.1(c)(8). The court's decision requires only an individualized determination by the Attorney General that detention is warranted on this basis. Moreover, the alien bears the burden of proof and must rebut the presumption of danger or flight risk. *Id.* Furthermore, the INS can appeal any immigration judge bond decision with which it disagrees, and

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[10] Indeed, even *Reno v. Flores*, 507 U.S. 292 (1993), which did not implicate the fundamental right to be free from physical restraint since it involved placement of alien juveniles in licensed juvenile care facilities rather than in "shackles, chains, or barred cells," *see* Pet. App. 13a-14a (citing *Flores*, 507 U.S. at 302), provided a means for the alien juveniles to rebut the presumption that they could only be released to a parent, legal guardian or other adult relative. *See Flores*, 507 U.S. at 297 (noting that regulation in question authorized discretionary release of alien juveniles to other non-related adults upon demonstrating "unusual and compelling circumstances") (citing former 8 C.F.R. 242.24(b)(4) (1992)).

"automatically stay" an alien's release pending such appeal. *See* 8 C.F.R. 3.19(f), 3.19(i)(2). Notably, in the instant case all three respondents were found suitable for release on bond after individualized hearings were conducted before an immigration judge. Although the INS could have appealed, and even stayed, these bond orders, it chose not to do so. *See also Kim* Opp. at 21-22.[11]

4. Plenary review is particularly premature in light of the possibility that legislation will be enacted that will significantly limit the scope of Section 1226(c). *See* H.R. 1452, 107th Cong. (2001). Under this legislation, longtime lawful permanent residents who have not been convicted of certain disqualifying aggravated felonies, or who are eligible to seek cancellation of removal based on "urgent humanitarian reasons or significant benefit," would be entitled to discretionary release from detention if they can demonstrate lack of danger or flight risk. *Id.* Each of the respondents here would be eligible for release under this legislation, thereby rendering this case moot. *See also Kim* Opp. at 3-4, 26 (noting that proposed legislation, if enacted, would moot Kim's case as well).

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[11] Moreover, the INS has many other means for ensuring removal of aliens. For example, the government recently promulgated new surrender regulations that impose new penalties on aliens who fail to comply with an order of surrender, in addition to the existing threat of criminal prosecution. *See* 67 Fed. Reg. 31,157 (2002) (proposed May 9, 2002) (to be codified at 8 C.F.R. pts. 3, 236, 240, & 241). In addition, an INS-contracted study conducted by the Vera Institute for Justice found a 92% appearance rate for criminal aliens who were released under a pilot project that included other incentives to appear. *See* Eileen Sullivan et al., Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program, 3, 36 (2000), *at* http://www.vera.org/publication_pdf/aapfinal.pdf.

Further, as noted, the post-*Zadvydas* courts of appeals are unanimous in finding Section 1226(c) unconstitutional. If a split were to emerge among the circuits, the Court will have ample opportunity to determine if plenary review is warranted, as the issue is currently pending in three other courts of appeals. *See Zgombic v. Farquharson*, No. 00-6165 (2d Cir.), *Welch v. Ashcroft*, No. 00-7665 (4th Cir.), *Ly v. Hanson*, No. 01-3016 (6th Cir.), and *Danesh v. Jenifer*, No. 01-1735 (6th Cir.). *See Kim* Opp. at 26-27.

5. The government has also filed a petition for a writ of certiorari in *Elwood v. Radoncic* (No. 01-1459), which it identifies as a companion case. For the same reasons set forth here, as well as in Respondent's Brief in Opposition in *Kim* (at 27-28), that petition should also be denied. As noted in the Brief in Opposition in *Kim*, the Third Circuit's *Radoncic* decision is a particularly inappropriate vehicle for addressing the issues raised by Section 1226(c) for at least three reasons: First, it is an unreported decision with no precedential effect either within or outside the Third Circuit. *See Radoncic v. Zemski*, 28 Fed. Appx. 113 (3d Cir. 2001) (designating decision as "unreported" and "not precedential"); 3d Cir. I.O.P. 5.3 (designating "unreported" decisions as "not precedential"); 3d Cir. I.O.P. 5.7 ("unreported opinions" are not binding precedent and are not cited as authority by the court). Second, the case presents a substantial mootness question since the government itself states that Radoncic is no longer subject to detention under Section 1226(c), having received a final BIA removal order. *See* Petition for a Writ of Certiorari in *Radoncic* at 21. *See also* Pet. Br. at 5 ("Detention of an alien following entry of a final order of removal is governed by . . . 8 U.S.C. 1231(a)."). Indeed, at the time of the Third Circuit's decision, Radoncic had already received this removal

order, and thus the case was arguably moot at the time. Finally, Radoncic was never properly subject to mandatory detention under Section 1226(c), since he was never charged with deportability on one of the grounds designated under the statute. *Cf. Matter of Ching*, 12 I. & N. Dec. 710, 712-13 (BIA 1968) (construing "is deportable" language in former suspension of deportation provision as requiring actual charge of deportability under the designated ground).[12]

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[12] The government initially charged Radoncic with removability under 8 U.S.C. 1251(a)(1)(B) (1994) (illegal entry), Pet. Br. in *Radoncic* at 5, and subsequently under an additional ground, Section 1251(a)(1)(E)(i) (1994) (alien smuggling), Pet. Br. in *Radoncic* at 6-7. Neither of these are grounds for mandatory detention under Section 1226(c).

CONCLUSION

In sum, in light of this Court's decision in *Zadvydas*, and the other reasons stated herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 01-1616

In the Supreme Court of the United States

MICHAEL COMFORT, ACTING DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

PHU CHAN HOANG, THANH QUOC NGUYEN, AND PHAM QUA TRUNG

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

No. 01-1616

MICHAEL COMFORT, ACTING DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

PHU CHAN HOANG, THANH QUOC NGUYEN, AND PHAM QUA TRUNG

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

The petition in this case demonstrates that the case should be held pending this Court's disposition of the petitions in *DeMore* v. *Kim*, petition for cert. pending, No. 01-1491 (filed Apr. 9, 2002), and *Elwood* v. *Radoncic*, petition for cert. pending, No. 01-1459 (filed Apr. 4, 2002), and then should be disposed of as appropriate in light of the final dispositions of those cases. Respondents do not contest that demonstration. Indeed, respondents acknowledge the inextricable connection between *Kim*, *Radoncic*, and this case. See, *e.g.*, Br. in Opp. 11 (arguing that "[t]his petition should

be denied for the same reasons that both [*Kim* and *Radoncic*] should be denied.").

Respondents argue generally (Br. in Opp. 11-17) against reviewing the issue of whether the mandatory detention provisions of 8 U.S.C 1226(c) satisfy due process. Respondents repeat the arguments made by the aliens in *Kim* and *Radoncic*, which are addressed in the government's petitions and reply briefs in those cases. Review of the constitutionality of this Act of Congess is warranted for the reasons stated in the government's submissions in *Kim* and *Radoncic*, and in the petition in this case.*

* * * * *

The certiorari petition in this case should be held pending this Court's disposition of the petitions in *Kim* (No. 01-1491) and *Radoncic* (No. 01-1459) and then should be disposed of as appropriate in light of the final dispositions of those cases.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

JUNE 2002

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* One factual issue warrants clarification. Respondents state (Br. in Opp. 6 n.8) that they "are eligible for" relief from removal. In fact, they have asserted claims to relief, which will be considered in the pending removal proceedings. See Pet. App. 5a, 6a, 7a; Pet. 10 n.3.